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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v.

12-CR-171 (JPO)

5 MIKHAIL ZEMLYANSKY, MICHAEL
6 DANILOVICH, TATYANA
7 GABINSKAYA, JOSEPH VITOULIS,
8 BILLY GERIS,

Defendants.

Jury Trial

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9
10 New York, N.Y.
November 4, 2013

11 9: a.m.

12 Before:

13 HON. J. PAUL OETKEN,

14 District Judge

15
16 APPEARANCES

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19 Southern District of New York
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MICHAEL KELLEY, FBI

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Deliberations

1 (Deliberations resumed)

2 THE COURT: Good morning, everyone.

3 The jury began deliberating this morning at 9:44 and a
4 few minutes ago we received a note which has been marked Court
5 Exhibit 28, it is actually signed by juror no. 1, Ms. Alina
6 Weissman -- A-L-I-N-A, W-E-I-S-S-M-A-N -- and also by the
7 foreperson no. 8 and it says as follows:

8 Your Honor, I planned a trip with my entire family to
9 Mexico; 11 people are getting on a plane tomorrow at 7:00 a.m.
10 to celebrate my birthday. I really want to go. We were told
11 that this trial will go for six to eight weeks and my trip was
12 planned around that. Thank you for your consideration. Signed
13 juror no. 1.

14 That's all we have so far today. So, if you want to
15 talk about it for a minute I'm happy to hear what, if any
16 response, people think would be appropriate.

17 (counsel conferring)

18 THE COURT: Mr. Kim?

19 MR. KIM: Sure, your Honor.

20 I think the government's inclination is that we don't
21 respond specifically to this message and we await any further
22 messages from the jury because I don't know that there is any
23 response we could give that would not constitute some sort of,
24 or raise a risk of some sort of interference with their
25 deliberations. So, I think the better course is to not respond

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1 and wait until we hear further from them.

2 MR. FISCHETTI: Your Honor, I have a different
3 suggestion. I wouldn't like juror no. 1 to sit during the day
4 without knowing that she would be available to go on her trip.
5 I think what we should do is send back a note that we're aware
6 of her obligation and that she can leave to go on her trip but
7 she has to deliberate for the rest of the day so the jury
8 thinks they've got to keep deliberating. And I don't think it
9 is fair to have juror no. 1 just waiting until she gets the
10 okay that she can -- I think, unless the government disagrees,
11 because we haven't reached that point yet, I think we have to
12 discharge juror no. 1 on the --

13 THE COURT: But then what do we do? We only have 10
14 jurors, if we haven't gotten another deadlock note.

15 MR. FISCHETTI: We can cross that bridge when we come
16 to it. I have an idea.

17 THE COURT: What is your idea?

18 MR. FISCHETTI: Well, I would have to confer with my
19 colleagues but I do have an idea.

20 Your Honor, I don't think it would be wise to attempt
21 to plug in an alternate at this point, nor do I know if we can
22 once we have gone with 11. So, I don't know that. But to plug
23 in an alternate now, we have had 26 witnesses. This jury,
24 after hearing all the testimony, has asked for the testimony of
25 five witnesses which the alternates have not seen; also, the

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1 testimony of three experts which was over 300 pages. So, to
2 have them come in, and I think we both agree that the law is
3 that the jury must stop deliberating and they have to catch up
4 before all 12 can deliberate again, would be impossible having
5 had them gone.

6 But I think, your Honor, that I can talk to my
7 colleagues and when we lose juror no. 1, if your Honor decides
8 that you are not going to keep her against her will, that we
9 can stipulate to a jury of 10 which is permitted under Rule 23.

10 THE COURT: Rule 23 says at any time before the
11 verdict. We have now had a partial verdict. I have someone
12 looking into this now but I don't know whether before the
13 verdict, how that would play out in the context of having
14 already received a partial verdict. In any event, the
15 government would have to stipulate. If they don't, then that's
16 not an option.

17 MR. FISCHETTI: I think the way the rule reads, Judge,
18 and I would like to read it out loud for purpose of the record,
19 Rule 23 talks of jury size and on 23B it says:

20 In general, a jury consists of 12 persons unless this
21 Rule provides otherwise.

22 2. Stipulation for a smaller jury. At any time
23 before the verdict the parties may, with the Court's approval,
24 stipulate, in writing that (A) a jury may consist of fewer than
25 12 persons and then it says it can return a verdict.

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1 My reading of that rule, Judge, is before a verdict
2 against an individual. I mean, it is not a partial verdict.
3 One defendant is gone so we just have the rest and my client
4 has been acquitted of those counts so just 10 jurors continue
5 their deliberations. Of course we need the government's
6 consent to do that and I would have to confer with my
7 colleagues.

8 But, for my purposes, for Mr. Zemlyansky, that is what
9 we would propose: One, that this juror continues to deliberate
10 because her vacation is tomorrow; two, that your Honor excuses
11 the juror who has done well and faithful work under the terms
12 that we agreed for her to be here -- and having her here when
13 11 people are going to a birthday party in Brazil would be
14 coercive -- 3, have the jury continue to deliberate until the
15 end of the day with her and then if that juror leaves, if your
16 Honor agrees that she should leave, I will talk to my
17 colleagues to see if they would agree with my suggestion that
18 we go with a jury of 10 and then leave it to the government as
19 to whether or not they would consent to that.

20 That's my proposal anyway.

21 MR. KIM: Your Honor, I don't -- we can give some
22 thought to whether we even need to address that issue
23 proceeding with 10, but I think for know now the government's
24 position is that we don't need to respond to the note and the
25 concern expressed by juror no. 1. I just think it is, for the

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1 same reasons I think defense counsel articulated before when we
2 were talking about giving a concrete deadline for
3 deliberations, I don't think it would be productive in this
4 context.

5 MR. FISCHETTI: Then shouldn't we address the primary
6 question first? Is your Honor going to excuse that juror at
7 the end of the day? I suggest your Honor has to. I haven't
8 heard from the government.

9 MR. KIM: Yes, I think we agree with that. I think
10 the juror should be excused.

11 THE COURT: Yes. I am inclined to excuse her. She
12 had mentioned this through the marshal or through Mr. Skolnik
13 last week and I think even in jury selection she may have
14 mentioned it. So, I am inclined to excuse her.

15 MR. FISCHETTI: Judge, the only issue is do we tell
16 her that she can go tomorrow or just let her wait? I don't
17 know. Maybe she has to make a phone call if she thinks she has
18 to stay tomorrow. I don't see the harm in telling her that she
19 has to deliberate through the day but she can leave tomorrow.
20 I think that's the nice thing to do but I have no objection to
21 Mr. Kim's suggestion if your Honor thinks otherwise.

22 MR. KIM: I think the downside risk is one that we
23 have confronted in other contexts. If I recall during jury
24 selection we had a juror who had a preplanned trip and we
25 debated whether or not it would be productive to have the juror

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1 sit and we would notify that juror at a certain point that she
2 would be allowed to go on her trip. I think the concern that
3 was raised when we proposed that was that that juror would then
4 basically dis engage from all further deliberations. And I
5 know I guess in this context we can say you are instructed you
6 must deliberate today, but if she knows she's going on that
7 trip no matter what I think it raises a risk that she will
8 disengage and that I am not really a part of this anymore.

9 THE COURT: Do other defendants have --

10 MR. FISCHETTI: That would mean -- I think Mr. Kim's
11 suggestion is that we don't respond to the note at all.

12 MR. KIM: Yes.

13 MR. FISCHETTI: That's correct?

14 THE COURT: At least until later in the afternoon.

15 MR. KIM: Yes, assuming there is no notes in between
16 now and then.

17 MR. FISCHETTI: I take the other view just personally,
18 your Honor, that she knew she was going, she would be more
19 engaged to try and reach a resolution in this case rather than
20 just sitting there with her arms crossed wondering if she's
21 going to go to Brazil or not but that's just a thought on my
22 part. I really have no objection. We both agreed that she
23 should stay at least throughout the day. We have no need to
24 tell her and by not responding to the note it is as if we never
25 even got it. At least to send a note back to say we are aware

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1 that you have to leave tomorrow or something like that rather
2 than just do nothing I think is -- I don't think it is
3 conducive to the offense, quite frankly. That's my own
4 personal opinion.

5 THE COURT: Others?

6 MR. CREIZMAN: I don't have anything to add to that
7 substantively except to say that we join in that application on
8 behalf of Mr. Danilovich.

9 MR. GERSHFELD: Judge, I agree and I join in that
10 application on behalf of my client.

11 MR. GERMAN: Good morning, your Honor.

12 THE COURT: Good morning.

13 MR. GERMAN: I do agree with Mr. Fischetti's position.
14 If your Honor is inclined not to send any communication back I
15 think the Court should just say continue deliberations. I
16 don't know if they're sitting there waiting for a response to
17 the note and they're not actually deliberating at this point
18 and that would concern me. So, at a minimum, if you're
19 inclined to go with the government's proposal I think we should
20 just say continue deliberations.

21 MR. KIM: Your Honor, I think we would be fine if --
22 it sounds like maybe there is some consensus around at least
23 responding and saying we are aware of the trip, please continue
24 deliberating. Maybe something as short as that. I don't think
25 we would object to something like that.

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1 MR. FISCHETTI: I think that's -- Judge, I think
2 that's fair. That's right in the middle. I do agree to that.

3 THE COURT: Maybe something like I have received your
4 note and I am aware of your trip tomorrow. Please continue
5 deliberations through today. Or you wouldn't put in through
6 today?

7 MR. KIM: I think the through today might accomplish
8 what we didn't want to convey to the jury.

9 THE COURT: Okay. So, I have your note and I am aware
10 of your planned trip. Please continue deliberations.

11 MR. GERMAN: Yes.

12 THE COURT: Any objection to that?

13 MR. KIM: No, your Honor.

14 MR. FISCHETTI: Your Honor, after you send that in,
15 with regard to proceeding with a jury of 10, your Honor is
16 doing some research on that, I will confer with colleagues and
17 we will see if that is a viable suggestion that we have on our
18 part. Perhaps the government can do the same. And then we
19 will know at least what we are dealing with since we are not
20 going to keep her past 5:00. There are going to be issues we
21 have to address, we might as well firm it up on both sides if
22 we can now.

23 THE COURT: Okay, yes. So, why don't you be thinking
24 about that.

25 (Pause)

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1 THE COURT: How about this:

2 Dear members of the Jury: I have received your note
3 and I am aware of juror no. 1's planned trip tomorrow. Please
4 continue your deliberations.

5 MR. FISCHETTI: Sounds good.

6 MR. KIM: That's fine with the government, your Honor.

7 THE COURT: All right.

8 (pause)

9 THE COURT: All right, we will keep you posted.

10 (recess pending verdict)

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A F T E R N O O N S E S S I O N

2:05 p.m.

THE COURT: Good afternoon, everyone.

MR. KIM: Good afternoon.

MR. GERMAN: Good afternoon.

THE COURT: We received a note that's been marked
Court Exhibit 30 and it says, as follows:

Your Honor, after intense deliberation, we came to a
verdict on eight counts. We are still hopelessly divided on
all others. Signed, juror no. 8.

I will read it again:

After intense deliberation, we came to a verdict on
eight counts. We are still hopelessly divided on all others.

I interpret this as a reference to the partial verdict
that they already rendered. I assume that's what it means.
They say we came to a verdict on eight counts. I don't think
this means they have come to any additional unanimous verdict.

And then they say we are still hopelessly divided on
all others.

MR. GERMAN: Judge, from the defense perspective, we
are requesting a second Allen charge.

This was seven weeks of testimony, three days of
summations, over 30 witnesses. You gave them the first Allen
charge on Thursday at about 3:00. Within 45 minutes they come
to a partial verdict. It doesn't appear to me that they did

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1 any more deliberating after that. They basically came out,
2 they went in, they came out, you told them keep going, and then
3 we got a note right away saying we want to go home and come
4 back on Monday, and they've basically been deliberating about
5 four-plus hours this afternoon. So, the defense feels that the
6 Court should give them a second Allen charge. I have a case
7 here from the Second Circuit, it is 320 F.3d 185, Campos v.
8 Portuondo, it is writ of habeas corpus case where the Second
9 Circuit found that three Allen charges were not necessarily
10 coercive, that really you have to look at each individual case,
11 and I think in that case the trial only took -- I forget how
12 long but it was a very short trial. It did not even come close
13 to the amount of testimony, Court exhibits and time that has
14 been spent on this case. It is 2:00. I know we still have to
15 come to a decision on the situation with juror no. 1 but I
16 think the Court should give them an Allen charge and see what
17 happens by the end of the day.

18 MR. KIM: Your Honor, I agree.

19 I think you have to look at the facts of each case and
20 I think the facts of this case are pretty clear that I think
21 anything -- anything that suggests to the jurors that they
22 continue deliberating, I think the dangers of coercion just far
23 outweigh anything else here. I think your Honor did give them
24 an informal Allen charge before the formal Allen charge. We
25 give them the formal Allen charge. Since giving them that

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1 charge there has been no addition call for testimony; just
2 other notes, one juror being excused. We have I think another
3 note saying that they're still strongly divided which I think
4 preceded the partial verdict. So, now I think we have had -- I
5 think this will be the third note suggesting they are strongly
6 divided on whatever is left. I think at this point to give
7 them an Allen charge we are risking undue coercion here.

8 THE COURT: Anyone else?

9 MR. FISCHETTI: I just find it odd that in a lot of
10 cases this is the first time we have ever heard the government
11 say give us a hung jury so we can get out of here.

12 My position, Judge, is the same as Mr. German and also
13 to add to it, that as he pointed out, right after the Allen
14 charge they did come in with a verdict, partial, at least in 45
15 minutes or an hour. So, we do have until 5:00 before we have
16 to make a decision, that's almost three hours. I don't see the
17 harm in asking for an Allen charge. I really don't understand
18 the government's position that we are coercing the jury. They
19 are saying we are coercing them into an acquittal on those
20 charges. I believe we are entitled -- we are entitled -- as a
21 matter of law, to another Allen charge.

22 MR. KIM: They're definitely is not an entitlement as
23 a matter of law. I think the Court knows that.

24 THE COURT: I think it is a judgment call based on all
25 the circumstances. We are on the seventh day of deliberations.

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1 There were five weeks and one day of testimony plus openings
2 and summations. The jury first indicated it was deadlocked on
3 the 30th. I read what was a rereading of a section of my
4 instructions which were essentially a modified Allen charge at
5 that point. They continued to deliberate, they said they're
6 strongly divided on the 31st, and then I read another Allen
7 charge. So, I mean, at this point another Allen charge, I
8 think, would be the equivalent of a third Allen charge.

9 We could do it. We could try it.

10 MR. FISCHETTI: What is the harm, Judge?

11 THE COURT: The harm is that it's held to be coercive.

12 MR. KIM: I think that's right, your Honor. There is
13 a very clear harm.

14 MR. GERMAN: Judge, the Allen charge is deemed not to
15 be coercive. That's the whole point of the Allen charge and
16 that's the specific language that the Supreme Court cites is
17 appropriate under the circumstances.

18 I think it's incorrect to say this would be the third.
19 The first was not an Allen charge, you simply read the Court's
20 original charge so this would be the second Allen charge given
21 to them at this point. And when you consider that they've only
22 deliberated about five hours since the first Allen charge and
23 we did get movement after the first one, giving them a second
24 one at 2:10 in the afternoon and seeing where we are at 5:00, I
25 don't think there is any harm. We can't say that because we

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1 are asking for an Allen charge it is coercive. The Supreme
2 Court has deemed it not to be coercive.

3 MR. KIM: Your Honor, I'm sure the language of the
4 Allen charge is not inherently coercive but the reason there is
5 case law about this is because there is arguments about how
6 many times it becomes too much. This jury has come back and
7 said they are strongly divided. They just said they are
8 hopelessly divided. To then bring them out and charge them
9 again with the Allen charge the language of which is fine but
10 the circumstances under which it is being delivered, that's the
11 issue and I think under these circumstances it is unduly
12 coercive to do that.

13 MR. GERMAN: I'm trying to find exactly how long this
14 jury was out on this Second Circuit opinion because it was not
15 very long.

16 MR. KIM: Your Honor, it is not simply a matter of how
17 long the jury has been out, it is the history taking into
18 account what we know of their deliberations. What we know is
19 one juror has already been excused because of the intense
20 difference in the jury room and what we know is that they've
21 repeatedly said that they were divided and this one says they
22 are hopelessly divided.

23 MR. GERMAN: Judge, so this case which I cited to the
24 Court, the trial was short involving three government witnesses
25 whose testimony lasted less than six hours. Here we are

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1 talking about a case that had six weeks of testimony, 30
2 witnesses. So, I just think asking for a second Allen charge
3 is not coercive under these specific circumstances. And I'm
4 looking at 505 F.2d 845, this is United States v. See, this is
5 a Ninth Circuit case where they say a statement by the jury
6 that it is currently deadlocked has been held on insufficient
7 ground for declaring a mistrial.

8 So, I think giving the amount of time, resources,
9 effort that has been put into this litigation asking, giving
10 them an Allen charge at 2:15 and seeing where we are at the end
11 of the day is not coercive. The defense is unified in this
12 position and we would ask that the Court give the Allen charge.

13 MR. KIM: Your Honor, if you want to give the
14 government some time to find authority, clearly this is within
15 your discretion. We can find some legal authority where I
16 think under other circumstances it has been deemed coercive and
17 we can spend time finding those authorities if the Court wants
18 that.

19 THE COURT: I don't know. It is a totality of the
20 circumstances determination. I don't know that one more Allen
21 charge would necessarily be coercive. If I declare a mistrial
22 too early then I guess defendants have an argument on appeal,
23 no? Double jeopardy attaches or something.

24 MR. KIM: Your Honor, I guess -- I guess the
25 assumption is if you declared a mistrial, there was a

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1 subsequent trial and subsequent convictions and where they had
2 argued that the Court somehow prematurely declared a mistrial,
3 then I guess that's right, they would have some argument that
4 that is the case. But I think that argument is made, has been
5 made many times in the Second Circuit under lesser
6 circumstances. I don't think that is something that we are
7 concerned about here.

8 THE COURT: I'm going to take a brief recess.

9 (recess pending verdict)

10 THE COURT: I'm convinced that this jury is hopelessly
11 divided, as they say it. I'm going to declare a mistrial on
12 the remaining counts.

13 Just to go through for the record where we are, there
14 were -- we had five weeks and one day of testimony in the case
15 plus openings and closings on either end. Deliberations began
16 on Wednesday, October 23rd. This is the seventh day in which
17 the jury was deliberating. The original jury charge included
18 instructions on deliberations with language similar to an Allen
19 charge including the duty to deliberate and be open to others'
20 views and tried to reach a unanimous verdict and not surrender
21 each jurors' conscientious judgment. The jury first indicated
22 that it was deadlocked on October 30th and at that time the
23 original jury charge was reread with a modification reminding
24 the jury that they were to consider each defendant
25 individually. Whether you call this an Allen charge I'm not

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1 sure, but it was essentially largely the language of a modified
2 Allen charge that I reread. The jury continued to deliberate
3 on October 31st and again indicated that they were deadlocked.
4 They said they were strongly divided on the 31st and at that
5 time the Court issued an Allen charge and instructed the jury
6 that they had the ability or could render a partial verdict and
7 then, shortly thereafter, they came back and said they had a
8 partial verdict. I don't think that that was a result of the
9 Allen charge language so much as a result of the fact that
10 we -- that I told them for the first time that they could
11 render a partial verdict. And then, as I said, they did render
12 that partial verdict on the 31st. The jury was then instructed
13 to continue deliberating. Today, November 4th, the jury issued
14 a third deadlocked note and this time they said we are still
15 hopelessly divided on all others meaning all other counts.
16 This is day seven of deliberations.

17 I'm concerned about an additional Allen charge which I
18 think would be the equivalent of a third Allen charge. I'm
19 concerned that that would result in an unduly coercive
20 instruction to the jury. Considering the entire context of the
21 case and part of that context is the fact that last week on, I
22 believe it was Wednesday the 30th, we lost a juror due to
23 medical reasons, but one of the things we learned from that
24 situation was that the deliberations at that point had been
25 extremely heated and that's why she wasn't able to continue;

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1 she referred to insults and a very heated situation in the jury
2 room.

3 So, that's part of the context here. Also, I think it
4 is noteworthy that the jury knows that one of the other jurors
5 has a flight tomorrow and I have indicated that they should
6 continue deliberating but they don't know whether she's going
7 to be let go or to continue deliberating tomorrow. So, I think
8 that also arguably makes an additional Allen charge unduly
9 coercive.

10 We're in the third week. There have been 13 days
11 since the first day of deliberations including that day given
12 the number of breaks and weekends we've had and sometimes
13 breaks are useful for deliberations but they also highlight
14 long a period of time it is. It is not just the seventh day
15 but it has been a long time of deliberations and my sense from
16 all the circumstances is that this jury truly is, as they put
17 it, hopelessly divided on the remaining counts. So, I'm going
18 to thank them for their service and we have already taken the
19 partial verdict, I believe, and declare a mistrial on the
20 remaining counts.

21 MR. GERMAN: Judge, just one request, and for the
22 record I agree with your interpretation of their last note but
23 just to be 100 percent certain, we would request that you just
24 ask that they haven't reached a verdict on eight additional
25 counts before you declare the mistrial.

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1 THE COURT: Would there be any objection to when they
2 come out if I asked the foreperson that?

3 MR. GERMAN: No. That's fine.

4 THE COURT: In other words, I would just confirm when
5 you say in your note that you came to a verdict on eight
6 counts, my assumption is that you're not referring to any
7 additional counts from those that you rendered a partial
8 verdict on last week and just get the foreperson's confirmation
9 of that.

10 MR. GERMAN: That's fine, Judge.

11 MR. KIM: That's fine with the government, your Honor.

12 We have one additional request. We would ask the
13 Court to ask the jurors, for those who are willing, to stay
14 behind and speak with any attorneys who would like to speak
15 with them. I think that would be very useful for the
16 government. If the Court could just ask those jurors who would
17 like to do that? I don't know if the Court would prefer to do
18 that in the jury room or somewhere else.

19 THE COURT: I always do that. I give them a chance to
20 speak to counsel and I ask them not to reveal the substance of
21 their fellow jurors' deliberations but that they're welcome to
22 speak to counsel if they wish to, or they don't have to. And I
23 normally also offer before that happens to go back and thank
24 them for their service. So, I don't know what -- I could tell
25 them where to go.

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1 MR. KIM: Perhaps when your Honor thanks them for
2 their service if you can ask those jurors to remain in the jury
3 room and go to them? That might be the easiest logistically.

4 THE COURT: Is that okay with everybody?

5 MR. GERMAN: We would join in that application.

6 MR. FISCHETTI: We join in that. We would like to
7 speak to them if they want to speak with us.

8 THE COURT: I will tell them to remain in the jury
9 room and will let you know when I am done thanking them. It
10 may be a few minutes because Mr. Skolnik has a few
11 administrative things to deal with them on and it may be a few
12 minutes. So, if you will wait around he will let you know.

13 MR. FISCHETTI: It may be good because some of the
14 jurors may not want to speak to us and leave and the other
15 jurors will be there so we don't mind waiting.

16 THE COURT: Sure. Anything else that I need to cover?

17 MR. KIM: Not from the government, your Honor.

18 MR. FISCHETTI: Not from defense.

19 THE COURT: Okay. We will bring out the jury.

20 (Continued on next page)
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1 (Jury present)

2 THE COURT: Good afternoon, Ladies and Gentlemen.

3 THE JURY: Good afternoon.

4 THE COURT: I have received your note which has been
5 marked Court Exhibit 30 that says:

6 After intense deliberation, we came to a verdict on
7 eight counts. We are still hopelessly divided on all others.

8 The first thing I wanted to ask and I will ask your
9 foreperson, juror no. 8, if you would just confirm when you
10 refer to we came to a verdict on eight counts, am I correct in
11 reading that as you haven't come to a verdict on any new counts
12 but that refers to the ones you came to last week and announced
13 here in Court?

14 THE FOREPERSON: Wait one second.

15 THE COURT: Okay. Do you understand the question?

16 THE FOREPERSON: We came up with one client as
17 completely not guilty and another one we have accounted for --

18 THE COURT: Wait, wait. No. Before you say that what
19 I'm asking is --

20 THE FOREPERSON: Oh, it is an additional count. I'm
21 sorry.

22 THE COURT: Did you do you mean any additional --

23 THE FOREPERSON: Yes.

24 THE JURY: Yes.

25 THE COURT: Okay. How many -- don't give me any

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Deliberations

1 results but how many additional ones? Was it eight additional
2 counts?

3 THE FOREPERSON: Yes.

4 THE COURT: Oh, you have.

5 A JUROR: Yes. Eight additional.

6 THE COURT: I'm sorry. I misunderstood. When I read
7 we came to a verdict on eight counts I thought that meant the
8 ones you came to last week.

9 A JUROR: No.

10 THE COURT: But you did come to some additional ones.

11 THE FOREPERSON: Yes, we have.

12 THE COURT: All right. Have you completed the verdict
13 form as to those additional ones?

14 THE FOREPERSON: No. We were waiting for your
15 instructions.

16 THE COURT: Okay. Got it.

17 So what I'm going to do is send you the verdict
18 form -- well, before I do that let me ask you, you have come up
19 with some additional lines to fill out, just to be clear?

20 THE JURY: Yes.

21 THE COURT: More than one?

22 THE JURY: Yes.

23 THE COURT: But you say you are hopelessly divided on
24 the other counts?

25 THE FOREPERSON: Yes.

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1 THE COURT: I'm going to send you back and I'm going
2 to send you your verdict form once again, the one you filled
3 out before, and then you can add the additional answers on that
4 form again assuming that it is unanimous as to all of those and
5 then we will bring you back and take that additional verdict,
6 okay? Thanks very much.

7 I'm going to send you back to the jury room.

8 (Continued on next page)

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1 (Jury not present)

2 MR. GERMAN: I will say, your Honor, I did agree with
3 your interpretation of the note.

4 MS. MAGLIERI: That's what I thought, eight more. He
5 told me I was wrong.

6 THE COURT: You guys are the experts.

7 Apparently they have the original form they filled out
8 before, so is there any objection to our telling them they
9 should fill out what additional answers they have on that form?

10 MR. KIM: On the original form?

11 THE COURT: On the original.

12 MR. KIM: We don't object to that, your Honor.

13 MR. GERMAN: No objection.

14 THE COURT: Okay.

15 (Recess pending verdict)

16 MR. GERMAN: Your Honor?

17 THE COURT: Yes, Mr. German.

18 MR. GERMAN: Judge, the defense has conferred and
19 given the fact that it's -- well, we misinterpreted the note
20 again and it is obvious that after the first Allen charge that
21 your Honor has given and about six hours of deliberations they
22 have actually now resolved 16 of the 30 counts. That's half of
23 the counts in this indictment. So, the defense is unified in
24 making an application that your Honor take this partial
25 verdict, give them an Allen charge, it is 3:00, and have them

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1 deliberate at least until the end of the day.

2 THE COURT: Mr. Kim?

3 MR. KIM: Your Honor, I don't think the wording of the
4 note has changed since the last time we heard it. They said
5 they are hopelessly divided. They sent us that note knowing
6 that they had intensely deliberated and reached a verdict on
7 the counts they could reach a verdict on and told us they were
8 hopelessly divided on all others. So, I think the same
9 reasoning applies why as to the remaining counts another Allen
10 charge or further deliberations is unnecessary.

11 THE COURT: This does change the calculus. Let me
12 just say for the record it is now clear that we misinterpreted,
13 or at least I misinterpreted the note and they were able to
14 reach a verdict on eight -- it sounds like eight additional
15 counts. We will find out shortly what it was and this was
16 after on Thursday saying that they were, "strongly divided."
17 Now, it is true that today they said "hopelessly divided" so
18 that ratchets it up a bit. But, the fact they reached eight
19 additional counts I think does suggest some decision-making
20 despite being previously divided. I guess it would also be
21 helpful, it might be helpful to tell them that juror no. 1 will
22 be able to go on her trip tomorrow or we could just keep her
23 here, we can keep them here tonight and see if they can go a
24 little later tonight to continue if we are going to have them
25 continue.

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Deliberations

1 Is there agreement on going to 10 if we need to go to
2 10 jurors?

3 MR. KIM: Not from the government, your Honor.

4 THE COURT: No?

5 MR. KIM: No.

6 MR. FISCHETTI: Your Honor knows the defense position.

7 THE COURT: Yes, but we can't do it by stipulation.

8 MR. FISCHETTI: That's right.

9 THE COURT: So, if I let her go they have to finish
10 tonight.

11 MR. MYERS: That's right.

12 MR. FISCHETTI: If your Honor does let her go.

13 THE COURT: Okay.

14 Here is the latest note. This just in: Hello. We
15 filled out the form as instructed, Court Exhibit no. 31.

16 So, I think what I will do is I will have them come
17 out and they'll take the verdict or would you propose something
18 else?

19 MR. KIM: Your Honor, may we have just a minute?

20 THE COURT: Sure.

21 (counsel conferring)

22 MR. KIM: Your Honor, can we go back on the record if
23 defense counsel is ready?

24 Your Honor, the reason I hesitate is I think we should
25 resolve the question first of what we are going to do with this

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1 jury, whether they'll be instructed to continue deliberating or
2 not because our concern is that by bringing them out, taking
3 another partial verdict and then let's say the Court decides to
4 instruct them to keep deliberating, just that pattern obviously
5 is a pattern that has not been in our favor recently but I
6 think there is something more inherently coercive about that to
7 say, well, you filled it out and you vote not guilty on these
8 guys, keep going. I mean, I think there is -- I think if we
9 are going to tell them to keep going we should not take the
10 partial verdict yet, we should let them do what they're going
11 to do and come back and tell us at the end of the day what it
12 is that they've got.

13 THE COURT: Any thoughts on that?

14 MR. FISCHETTI: I think we have to confer for a
15 minute, Judge.

16 THE COURT: Okay.

17 (Counsel conferring)

18 MR. FISCHETTI: Judge, as we understand the
19 government's position, rather than take the partial verdict you
20 would somehow announce to them that you have a partial verdict,
21 now go back out and continue deliberating?

22 THE COURT: Yes.

23 MR. KIM: I'm sorry. I missed what you said
24 Mr. Fischetti. I'm sorry.

25 MR. FISCHETTI: As I said I understand the

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1 government's position, we do not take the partial verdict now,
2 right? We call them in, I guess, and tell them to continue to
3 deliberation.

4 MR. KIM: No. No. I think our position is we should
5 resolve that issue, whether we are going to tell them to
6 continue deliberating. We should resolve that now as opposed
7 to bringing them in, taking the verdict and then discussing the
8 issue. That's all.

9 MR. GERMAN: If the government's concern is a pattern
10 of bringing them out, taking a verdict and then telling them to
11 go back in, the defense has no problem not taking the verdict
12 at this time, simply telling them continue to deliberate.

13 THE COURT: Let's say, assume that I am inclined
14 because it is true, to have them continue deliberating maybe
15 until they can do it tonight, maybe 6:00 or 7:00, whatever, and
16 I'm thinking about telling them that juror no. 1 is not going
17 to have to come in tomorrow and therefore you are going to be
18 done tonight but assume that I'm going to have them continue.
19 What is the downside of taking the verdict, the additional
20 partial verdict and then having them continue? I know it is
21 sort of bad habits for jurors or something.

22 MR. KIM: I think it is more than that, your Honor. I
23 think there is something a little bit more -- I see a greater
24 downside risk of coercion by doing something like that where
25 they come back, they give us a little bit more and we say,

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1 okay, still not good enough, go back in there and come back
2 with more. I mean, the point of this is I think that everybody
3 debates openly but still holds to their beliefs in the evidence
4 and I think each time we bring them here and say, all right,
5 you reached something but that is still not good enough, go
6 back in the jury room; I don't think that is what should be
7 happening here. I think what should be happening is everyone
8 debates very openly, talks about their views, nobody gives up
9 their truly-held beliefs and they come back and tell us this is
10 what we've got.

11 So, I think just as a principle I think that is more
12 consistent with saying let us know if you have reached a
13 verdict, yes or no. And if you are deadlocked on the rest,
14 then sobeit, as opposed to this kind of piecemeal approach that
15 almost came about I think not intentionally on anyone's part.

16 So, that's the government's view. And if the Court is
17 inclined to let them continue to deliberate then I think we,
18 the government, probably need to talk about what we would
19 propose, but we definitely don't think that if the Court is
20 inclined to let them deliberate you we don't think you should
21 take a partial verdict at this time.

22 THE COURT: Okay.

23 Do defendants have a different view?

24 MR. FISCHETTI: Well our first view, your Honor, is
25 that we want them to continue to deliberate as long as they

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1 possibly can, so I mean whether or not we take the partial
2 verdict now that we think they've agreed to or don't take the
3 partial verdict and tell them to continue to deliberate until
4 whatever time they can to fill out the rest of the verdict
5 sheet, I think we will take it either way. It doesn't make
6 much difference to us, does it?

7 MR. GERMAN: No, Judge.

8 My concern was I thought I heard your Honor say that
9 you were going to tell them that juror no. 1 is going home
10 today no matter what.

11 THE COURT: Well, I was thinking of telling them I'm
12 going to let her go on her trip tomorrow just because I had
13 raised that as one of the issues that I think is possibly being
14 coercive at this point, just that hanging over there so I was
15 thinking of telling them, well, you know, she's not going to
16 have to come back tomorrow and therefore are you not going to
17 have to either.

18 MR. GERMAN: Hold on. Can I have one second, your
19 Honor?

20 THE COURT: Sure.

21 (Counsel conferring)

22 MR. GERMAN: The unified defense position is we
23 request that your Honor not inform them that no. 1 is being
24 allowed to leave, that we deal with that at the end of the day.

25 MR. KIM: Your Honor, this is a constantly changing

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1 argument I guess on both sides, but given what's transpired the
2 government's view is that by not telling the jurors that juror
3 no. 1 will be able to leave and go on her trip that we are
4 basically creating a pressure cooker situation where all of
5 them, I think your Honor articulated this earlier, all the
6 jurors are going to ban together and say we need to do
7 something so that this woman can go on her vacation. It is
8 clearly on top of their mind. We had communication about it
9 last week and today so we need to be able to release that
10 artificial pressure and say this juror is going to be allowed
11 to go on this trip, otherwise I think we have them doing
12 whatever it takes to get out of this court house today.

13 MR. FISCHETTI: I just have a question for the
14 government: Why does Mr. Kim believe that if juror no. 1 is
15 excused that the other 10 can't deliberate? They have no
16 knowledge of that. We already excused one juror.

17 THE COURT: It is true. I could -- one thing I could
18 do is say that she will be allowed to go then not say anything
19 else about coming back.

20 MR. KIM: I see what the Court is saying, so making
21 clear that juror no. 1 will be able to go on her trip.

22 THE COURT: But then leave it at that.

23 MR. KIM: That's fine. Actually, I didn't mean to
24 suggest there would be a final communication about that but,
25 yeah, that's fine with the government.

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1 MR. FISCHETTI: Judge, how do I put this?

2 Judge, we have to make decisions now as defense
3 lawyers knowing that what we do here is going to be reviewed by
4 probably another set of lawyers regarding the positions we are
5 taking here with regard to appeal, with regard to former
6 jeopardy. There is no question that we would go with 10 jurors
7 and have asked the government to do that, they refused to
8 stipulate. When I first raised that before talking to my
9 colleagues, as your Honor remembers, I hope that I was going to
10 talk to them about a jury of 10, I said that then you would
11 have no problem with excusing juror no. 1. It turns out the
12 government won't stipulate to that.

13 Our unified position is we want a verdict in this
14 case. So, I think our position would be, Judge, that we're not
15 going to agree to have juror no. 1 excused. Of course your
16 Honor has the discretion to do that if your Honor feels that
17 that juror can no longer serve, but I think your Honor has to
18 make an independent decision regarding that and I don't think
19 just on the facts that we have thus far that she has a trip,
20 that it was long-planned, that she told us about the trip, that
21 there were 11 people going may not be viewed as a sufficient
22 reason to dismissing this jury. In other words, Judge what I'm
23 saying and I think my colleagues are joining, that we would not
24 consent to your Honor's excusing juror no. 1 and if we are not
25 consenting to it, then our position is that your Honor should

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1 have them deliberate, partial verdict, no partial verdict, and
2 then your Honor can make what decision you want. And, I think
3 that your Honor, respectfully, is required to have some kind of
4 discussion with that juror with defense counsel present -- and
5 I'm sure we'll waive defendants being present, perhaps waive
6 everyone except one defense counsel there -- for your Honor to
7 have an inquiry of this juror. And then your Honor could make
8 an independent decision whether or not, not that she's just
9 losing a trip or losing someone or anything like that, but that
10 she could not continue to sit having this vacation taken away
11 from her. I think that's the way we would like to proceed.

12 Am I correct, gentlemen?

13 MR. GERSHFELD: Yes.

14 MR. CREIZMAN: Yes.

15 MR. GERMAN: Yes, but I do think we are putting the
16 cart before the horse. I think -- and we are losing time,
17 quite frankly, with all of this. I would prefer to bring them
18 out. We have no problem not taking the partial verdict and
19 instructing them to go back and deliberate, give them another
20 Allen charge and then we can deal with all of this at the end
21 of the day.

22 MR. FISCHETTI: The reason why I bring it up is
23 because I didn't want your Honor to tell the juror that she is
24 excused indicating that we agreed to that.

25 THE COURT: Understood.

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1 MR. KIM: Your Honor, I don't think we are putting the
2 cart before the horse as to juror no. 1 because I think it is
3 an issue to have her -- to have any communication to continue
4 deliberating without some sort of communication about whether
5 she can go on vacation or not. So, I do think we need to
6 resolve that issue first because the danger of the coercion is
7 having them deliberate about her not knowing whether she can go
8 on vacation or not. That's the harm we see. So, I thought
9 that we would address whether or not no. 1 can go on vacation
10 and what, assuming she's allowed to go on vacation, what the
11 substance of the communication to the jurors is. But I don't
12 think we can have them deliberate without them knowing that.

13 THE COURT: Is there any objection to my inquiring of
14 her?

15 MR. KIM: No. And I think if the Court inquires as to
16 juror no. 1, I think the inquiry is basically could she
17 actually participate, meaningfully participate in deliberations
18 if she has this trip hanging over her head or if she has to
19 miss her trip.

20 I think that's the substance of that inquiry if the
21 defense wants that.

22 THE COURT: Well, I guess I'm inclined to call her out
23 and ask her questions about it.

24 Any objection?

25 (counsel conferring)

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1 MR. FISCHETTI: Your Honor, our position was that this
2 juror be sent back to deliberate without the indication that
3 she's going to be dismissed and then we deal with that later.
4 If it is your Honor's wish that your Honor would deal with this
5 first with the juror, then we withdraw our request because we
6 would like to use the time with the jurors sitting there not
7 knowing and stay for as late as she possibly can to try and get
8 a verdict.

9 THE COURT: Withdraw which request?

10 MR. FISCHETTI: In other words what we said before,
11 take a partial verdict or don't take a partial verdict but send
12 them out to continue to deliberate until the end of the day.

13 THE COURT: Right, but the government feels that that
14 would be coercive without nothing what's going on with juror
15 no. 1.

16 MR. GERMAN: Right. So, we would agree.

17 MR. FISCHETTI: Right.

18 MR. GERMAN: We would agree that your Honor would give
19 them the instruction that juror no. 1 is going to be allowed to
20 go home.

21 MR. FISCHETTI: Gee, we're in agreement with the
22 government now.

23 THE COURT: Okay. On telling them that juror no. 1
24 will be allowed to go on her vacation?

25 MR. FISCHETTI: Yes.

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1 THE COURT: Okay.

2 MR. FISCHETTI: And certainly we can ask them to
3 deliberate as long as they possibly can before we take a final
4 verdict.

5 THE COURT: Okay.

6 MR. FISCHETTI: As far as the partial is concerned the
7 government is still in position that they don't want a partial.

8 THE COURT: That's fine.

9 MR. KIM: We should let them continue to deliberate so
10 we shouldn't take the partial yet.

11 THE COURT: So we are at the point where we give them
12 one more Allen charge or some version of an Allen charge.

13 MR. FISCHETTI: Good.

14 THE COURT: Does anybody not like the language of an
15 Allen charge that I like which you guys didn't include which is
16 that there is no reason to think that any 12 or 11 other jurors
17 would be more conscientious and better at reviewing the
18 evidence than you are?

19 MR. FISCHETTI: I like that, Judge.

20 MR. GERMAN: No objection from the defense.

21 MR. CREIZMAN: No objection.

22 MR. GERSHFELD: No objection.

23 MR. KIM: Your Honor, I know that's language we have
24 included in Allen charges in the past. It just so happened we
25 took this straight from Sand. The version we gave the Court

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1 didn't have that language. I don't think it's error
2 necessarily on the Court's part to include additional language
3 but I think for sake of conformity, I don't think there is a
4 reason to add new language to a charge that they have been
5 given. If the purpose of the charge is to do the same thing I
6 think we should keep the charge as it was proposed and given to
7 the jury before.

8 (counsel conferring)

9 MR. KIM: Your Honor, to be clear, just so we iron out
10 exactly how this will go. The government's view is that the
11 jury should be brought out, the Court gives an Allen charge,
12 the same Allen charge that was given before, and just also just
13 says I want to inform juror no. 1 that obviously we are aware
14 of your trip, you will be allowed to go on your trip and leave
15 it at that, as opposed to asking the jurors how long they can
16 go tonight, I. Think it should be a simple communication.

17 THE COURT: Okay.

18 (Pause)

19 THE COURT: Okay. Are we ready to bring them out?

20 MR. GERSHFELD: Judge, I just have one question. Is
21 there any way possible that once they bring out their partial
22 verdict without actually publishing it to the Court or anyone
23 else, can you hold on to that verdict sheet so there is no
24 manipulation of the verdict sheet if they go back in knowing
25 that they have to continue to deliberate?

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1 THE COURT: I think they need to go back in with the
2 verdict form.

3 MR. KIM: Yes.

4 THE COURT: So that they can --

5 MR. KIM: The verdict is not final until they have
6 announced it in Court, your Honor. I think they should hold on
7 to the verdict form.

8 THE COURT: I think that's right.

9 MR. KIM: And, your Honor, I think just for clarity, I
10 think the Court should also let the jurors know that we are not
11 taking the verdict right now.

12 THE COURT: Yes.

13 MR. KIM: I'm going to tell you this, you should keep
14 deliberating on all the counts --

15 MR. GERMAN: No.

16 MR. FISCHETTI: Absolutely not.

17 MR. KIM: -- for which you have not reached a verdict.

18 MR. GERMAN: No.

19 MR. FISCHETTI: Absolutely not.

20 THE COURT: Wait. What's wrong with that?

21 MR. FISCHETTI: In other words change their verdict?

22 THE COURT: On all the counts that they have not
23 reached a verdict on.

24 MR. MYERS: That's not what he said.

25 MR. KIM: I said for which you have not reached a

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1 verdict. We can ask the court reporter to read it back,
2 Mr. Myers.

3 MR. GERMAN: We heard all remaining counts --

4 MR. MYERS: We heard everything else in that sentence.
5 Go ahead.

6 THE COURT: What I was thinking is saying something
7 like: I have your note indicating and I understand you have
8 reached a unanimous verdict as to some additional counts. I'm
9 going to ask you once again or one more time to listen to the
10 following instruction. I'm not going to take that partial
11 verdict now and then ask you to deliberate further in an effort
12 to reach unanimous verdict on any counts that you have not
13 reached a verdict on yet.

14 MR. FISCHETTI: Thank you, Judge.

15 THE COURT: Okay.

16 MR. KIM: Your Honor, can we have one minute?

17 THE COURT: Sure.

18 (Counsel conferring)

19 MR. KIM: Nothing further, your Honor.

20 THE COURT: Okay. All set?

21 Please, bring out the jury.

22 (Continued on next page)

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1 (Jury present)

2 THE COURT: Good afternoon again, Ladies and
3 Gentlemen.

4 THE JURY: Good afternoon.

5 THE COURT: One thing I wanted to respond to briefly.
6 Juror no. 1, I have your note about your trip planned for
7 tomorrow and I want to let you know that you are going to be
8 able to go on your trip.

9 A JUROR: Oh, thank God. Thank you.

10 THE COURT: To the jurors more broadly, I did get your
11 communication from when you were out here before that you have
12 reached a verdict as to, I believe, eight additional lines or
13 eight additional counts, and I'm not going to ask you for that
14 verdict right now because I'm going to ask you one more time to
15 make an effort at a unanimous verdict keeping in mind the
16 following instruction which I would like to read to you: As I
17 told you in my original instructions, this case is an important
18 one to the government and it is equally important to the
19 defendants. It is desirable if a verdict can be reached but
20 your verdict must reflect the conscientious judgment of each
21 juror and under no circumstance must any juror yield his or her
22 conscientious judgment. It is normal for the jurors to have
23 differences. This is quite common. Frequently jurors, after
24 extended discussion, may find that a point of view which
25 originally represented fair and considered judgment might well

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1 yield upon the basis of argument and upon the facts and the
2 evidence. However, and I must emphasize this, no juror must
3 vote for any verdict unless after full discussion and
4 consideration of the issues and exchange of views it does
5 represent his or her considered judgment.

6 Further consideration may indicate that a change in
7 original attitude is fully justified upon the law and all the
8 facts. I do want to read you a statement which I read you
9 before in a Supreme Court opinion that is well known and it is
10 this:

11 That although a verdict must be the verdict of each
12 individual juror and not a mere acquiescence and conclusion of
13 his fellows, yet they should examine the question submitted
14 with candor and with the proper regard and deference to the
15 opinions of each other; that is, with their duty to decide the
16 case if they could conscientiously do so; that they should
17 listen, with a disposition to be convinced, to each others'
18 arguments; that if the much larger number were for a
19 conviction, a dissenting juror should consider whether his or
20 her doubt was reasonable one which made no impression on the
21 minds of so many men, equally honest, equally intelligent with
22 himself. If upon the other hand the majority was for
23 acquittal, the minority ought to ask themselves whether they
24 might not reasonably doubt the correctness of a judgment which
25 was not concurred in by the majority.

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1 I do not mean to suggest that a position is
2 necessarily correct merely because a greater number of jurors
3 agree with it. Those in the majority should also consider all
4 reasonable arguments and opinions of those in the minority.

5 You are reminded also that the prosecution bears the
6 burden of proving each element of each offense beyond a
7 reasonable doubt.

8 Do not ever change your mind just because the other
9 jurors see things differently, or just to get the case over
10 with. As I told you before, in the end, your vote must be
11 exactly that, your vote. As important as it is for you to
12 reach unanimous agreement, it is just as important that you do
13 so honestly and in good conscience. What I have just said is
14 not meant to rush or pressure you in agreeing on your verdict.
15 Take as much time as you need. It is the desire of the Court
16 and the parties that, if possible, you return a verdict on all
17 defendants and on all counts, if you can do so without
18 violating your individual conscience.

19 However, if, after conscientious deliberations you are
20 only able to reach a verdict concerning some of the defendants
21 or some of the counts, you may return a verdict concerning
22 those defendants or those counts.

23 Now you have told me that you have already reached as
24 to eight additional counts and I'm not going to take that now
25 because I'm going to ask you to take one more attempt at trying

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1 to reach unanimous verdict as to additional counts that you
2 have not yet reached a verdict to.

3 So, with that in mind, I'm going to ask you to go back
4 and continue your deliberations this evening.

5 Thanks very much.

6 (Continued on next page)

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1 (Jury not present)

2 THE COURT: We will keep you posted.

3 (Recess pending verdict)

4 THE COURT: Okay, we have another note from the jury
5 which has been marked Court Exhibit 32. It says hello, your
6 Honor. We would like to leave today at 5:00 p.m. Thank you.
7 Juror no. 8.

8 MR. MYERS: Which means juror no. 1 is not going on
9 vacation.

10 THE COURT: Well, I think they don't know the effect
11 of losing juror no. 1 because we haven't told them. So, one
12 thing that we might consider is asking them whether they
13 remain, as they put it, hopelessly divided on any additional
14 counts and if they say they do, then take the additional
15 partial verdict. The other possibility is in, in connection
16 with that or not, asking them if they can stay a little later
17 tonight which might indicate to them that they will not have to
18 come back tomorrow.

19 (Counsel conferring)

20 MR. KIM: We are ready to go first, your Honor.

21 The government's view is that we should not suggest to
22 the jurors they can stay late tonight because we have never
23 done it before. I think the combination of their knowledge
24 that no. 1 is going to be able to go on her trip tomorrow
25 coupled with some suggestions they should stay late tonight, we

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1 think, would be coercive. We are essentially staying stay
2 tonight to possibly reach a verdict.

3 We all knew this was an issue last week. As of last
4 Thursday the Court put on the record on the transcript at 4965
5 that this was an issue. We, all the parties and the Court
6 agreed to allow the jurors to leave for the day on Thursday
7 without asking if they wanted to come back on Friday. We let
8 them come back on Monday as they chose to do so all the while
9 knowing that this could potentially happen tomorrow. So, I
10 don't think that we should now create undue pressure on the
11 jurors to reach some sort of haphazard verdict tonight no
12 matter what the hour because this issue is looming.

13 THE COURT: We also can't let them go at 5:00.

14 MR. KIM: I don't understand why, Judge.

15 THE COURT: We are going to have 10 jurors tomorrow.

16 MR. KIM: Our proposal would be we take the partial
17 verdict and we prepare to dismiss them at 5:00 and declare a
18 mistrial on the remaining counts.

19 THE COURT: Okay.

20 MR. KIM: Because they've already indicated they're
21 deadlocked as to the remaining counts as to which they did not
22 reach a partial verdict before. So, I think it is perfectly
23 appropriate for the Court to take whatever verdict there is and
24 let them go at 5:00 and the mistrial on the remaining counts at
25 that point.

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1 We do not believe the jurors should be given an
2 instruction about the fact they can stay late tonight given the
3 circumstance of juror no. 1. We think you are putting them in
4 a pressure cooker essentially holding them hostage to reach
5 resolution tonight and they also have not -- just it is not
6 that we've -- the foreperson has been great about wording his
7 notes accurately but this is the first note that we have
8 received in which the jury has said they want to leave at 5:00
9 and not said that they want to come back tomorrow, so.

10 MR. FISCHETTI: I think Mr. Kim wants to withdraw that
11 last remark.

12 Your Honor, I think the issue honestly -- and I invite
13 counsel to join me in this -- is a rather simple one and that
14 is is this jury now hung, completely deadlocked? That's the
15 issue that we have here. They didn't say that.

16 Now, your Honor, I listened to your Honor carefully
17 with regard to the Allen charge, the last time, how long they
18 were out and that this jury would be dismissed and juror no. 1
19 would be dismissed because they were deadlocked because they
20 couldn't reach a verdict because they were divided. You have a
21 note now that does not say that. You have a note now that says
22 we would like to leave at 5:00, not that we are deadlocked, not
23 that we haven't made any progress on the basis of the last
24 Allen charge when, as your Honor knows, the Allen charge before
25 this resulted in a partial verdict.

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1 So I think, your Honor, most respectfully on behalf of
2 the defendants and, quite frankly, I think your Honor must ask
3 this jury when they come back, in some words that we will agree
4 upon whether or not they have made any progress or whether or
5 not they are still deadlocked. And if the answer is yes, we
6 have made progress, then on behalf of all defendants we want to
7 keep this jury as long as we possibly can to see if they'll
8 come up with more verdicts on counts or unanimous verdict. If
9 they say no, we haven't, we are still deadlocked then I agree
10 with Mr. Kim. But suppose your Honor asked that question and
11 they say, yes, we have another partial verdict or we have
12 agreed on one more count, we are moving toward a resolution.
13 Are you going to dismiss this jury at 5:00? I don't think your
14 Honor can, most respectfully.

15 THE COURT: I'm inclined to ask them. I think it is
16 appropriate to ask them whether they remain hopelessly divided
17 on the additional counts that they referred to in their prior
18 note. I guess maybe the way to do that is by a note to them.

19 MR. KIM: I think that's fine, your Honor.

20 MR. GERMAN: Judge, I think that language is inviting
21 of a very simple yes question so they can go home. I think
22 perhaps Mr. Fischetti alluded to the word "progress." I think
23 that's a better choice of words, "are you making progress," and
24 see what they say. If they come back and say we are hopelessly
25 divided, then they will.

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1 MR. KIM: Your Honor?

2 THE COURT: How about --

3 MR. KIM: Your Honor, we trusted the jury to follow
4 the instructions that we have given them. We have trusted them
5 to follow the instructions in the Allen charge. The Court has
6 instructed them numerous times to deliberate. There is no
7 reason to stop trusting them now to answer a question honestly.
8 They told us they were hopelessly divided. I think it is a
9 fair question for to us repeat that to them and ask are you
10 still hopelessly divided.

11 THE COURT: How about: Earlier in your deliberations
12 today you informed the Court that you were hopelessly divided
13 in your deliberations as to additional counts. Are you still
14 divided as to those counts? Or do you believe that additional
15 deliberations might yield a unanimous verdict as to additional
16 counts?

17 MR. FISCHETTI: That's fine with me. I agree with
18 that, Judge.

19 MR. KIM: Your Honor, I think we are fine with that as
20 well. And perhaps for this jury, maybe instead of "yield" we
21 would say "result in a unanimous verdict" or something.

22 THE COURT: Okay.

23 MR. KIM: Your Honor, I would also make clear just
24 given the history with this jury, that maybe we should, at the
25 end of the note, make clear that they shouldn't respond with

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1 whatever their verdict is in the note but just to make clear to
2 tell them what kind of answer we are looking for. So, answer
3 yes or no or something to that effect so they don't respond
4 with, well, we reached a verdict on these defendants as to
5 these counts.

6 MR. FISCHETTI: Why not? Isn't that what we are
7 looking for?

8 MR. KIM: They can fill out the verdict form.

9 THE COURT: The way I worded it doesn't really result
10 in a yes or no. How about maybe a mini verdict form that says:

11 Earlier in your deliberations you informed the Court
12 that you were hopelessly divided in your deliberations as to
13 additional counts. Are you still divided as to those
14 additional counts? Yes. No. Do you believe that further
15 deliberations may as a result in a unanimous verdict as to
16 additional counts? Yes. No.

17 MR. FISCHETTI: That's fine with us, Judge.

18 MR. KIM: That's fine with the government.

19 THE COURT: All right. We will let you know.

20 (Recess pending verdict)

21 THE COURT: We have received Court Exhibit 33 which is
22 the completed answers to my note and I will just read it with
23 their check marks.

24 Earlier in your deliberations you informed the Court
25 that you were hopelessly divided in your deliberations as to

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1 additional counts. Are you still divided as to those
2 additional counts. They checked yes.

3 Do you believe that further deliberations may result
4 in a unanimous verdict as to additional counts? They checked
5 no.

6 MR. KIM: Your Honor, I think our proposal is that we
7 bring the jurors out, take the partial verdict and then declare
8 the mistrial as to the remaining counts.

9 THE COURT: Any objection?

10 MR. FISCHETTI: No, your Honor.

11 MR. GERMAN: None.

12 THE COURT: Okay. Bring them out.

13 (Continued on next page)
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1 (Jury present)

2 THE COURT: Good afternoon, Ladies and Gentlemen.

3 THE JURY: Good afternoon.

4 THE COURT: I have received your answers to my
5 questions. Thank you for that.

6 I will ask juror no. 8, the foreperson, if you would
7 please stand. Is the jury still divided as to the additional
8 counts?

9 THE FOREPERSON: Yes, your Honor.

10 THE COURT: Have you reached a verdict as to those
11 additional counts that you referred to in your last note?

12 THE FOREPERSON: Yes, your Honor.

13 THE COURT: Have you noted it in the same verdict form
14 as the earlier verdict?

15 THE FOREPERSON: Yes, your Honor.

16 THE COURT: Does the jury believe that further
17 deliberations may result in a unanimous verdict as to
18 additional counts?

19 THE FOREPERSON: No, your Honor.

20 THE COURT: Please hand the verdict form to the deputy
21 clerk.

22 (The Court reviewing verdict form)

23 THE COURT: The deputy clerk is handing back the
24 verdict form. If you would remain standing, please,
25 Mr. Foreperson and Mr. Skolnik will receive the verdict.

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1 THE DEPUTY CLERK: In the matter of United States of
2 America versus Mikhail Zemlyansky, Michael Danilovich, Tatyana
3 Gabinskaya and Joseph Vitoulis:

4 Count One, racketeering conspiracy. How does the jury
5 unanimously find the defendant Michael Zemlyansky, guilty or
6 not guilty?

7 THE FOREPERSON: Blank.

8 THE DEPUTY CLERK: As to defendant Michael Danilovich,
9 guilty or not guilty?

10 THE FOREPERSON: Blank.

11 THE DEPUTY CLERK: Count Two, health care fraud
12 conspiracy. As to the defendant Michael Zemlyansky, guilty or
13 not guilty?

14 THE FOREPERSON: Not guilty.

15 THE DEPUTY CLERK: As to defendant Michael Danilovich,
16 guilty or not guilty?

17 THE FOREPERSON: Blank.

18 THE DEPUTY CLERK: As to defendant Tatyana Gabinskaya,
19 guilty or not guilty?

20 THE FOREPERSON: Blank.

21 THE DEPUTY CLERK: As to defendant Joseph Vitoulis,
22 guilty or not guilty?

23 THE FOREPERSON: Not guilty.

24 THE DEPUTY CLERK: Count Three, health care fraud. As
25 to the defendant Michael Zemlyansky, guilty or not guilty?

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1 THE FOREPERSON: Not guilty.

2 THE DEPUTY CLERK: Michael Danilovich, guilty or not
3 guilty.

4 THE FOREPERSON: Blank.

5 THE DEPUTY CLERK: Tatyana Gabinskaya, guilty or not
6 guilty?

7 THE FOREPERSON: Blank.

8 THE DEPUTY CLERK: Joseph Vitoulis, guilty or not
9 guilty?

10 THE FOREPERSON: Not guilty.

11 THE DEPUTY CLERK: Count Four, mail fraud conspiracy.
12 As to defendant Michael Zemlyansky, guilty or not guilty?

13 THE FOREPERSON: Not guilty.

14 THE DEPUTY CLERK: As to defendant Michael Danilovich,
15 guilty or not guilty?

16 THE FOREPERSON: Blank.

17 THE DEPUTY CLERK: As to Tatyana Gabinskaya, guilty or
18 not guilty?

19 THE FOREPERSON: Blank.

20 THE DEPUTY CLERK: As to Joseph Vitoulis, guilty or
21 not guilty?

22 THE FOREPERSON: Not guilty.

23 THE DEPUTY CLERK: Count Five, mail fraud. As to
24 defendant Michael Zemlyansky, guilty or not guilty?

25 THE FOREPERSON: Not guilty.

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1 THE DEPUTY CLERK: Michael Danilovich, guilty or not
2 guilty?

3 THE FOREPERSON: Blank.

4 THE DEPUTY CLERK: Tatyana Gabinskaya, guilty or not
5 guilty?

6 THE FOREPERSON: Blank.

7 THE DEPUTY CLERK: Joseph Vitoulis, guilty or not
8 guilty?

9 THE FOREPERSON: Not guilty.

10 THE DEPUTY CLERK: Count Six, money laundering
11 conspiracy, as to Michael Zemlyansky: Already reported, not
12 guilty. As to defendant Michael Danilovich, guilty or not
13 guilty?

14 THE FOREPERSON: Blank.

15 THE DEPUTY CLERK: Count Seven, money laundering. As
16 already reported, Michael Zemlyansky, not guilty. As to the
17 defendant Michael Danilovich, guilty or not guilty?

18 THE FOREPERSON: Blank.

19 THE DEPUTY CLERK: Count Eight, money laundering. As
20 already recorded: Michael Zemlyansky, not guilty. As to
21 defendant Michael Danilovich, guilty or not guilty?

22 THE FOREPERSON: Blank.

23 THE DEPUTY CLERK: Count Nine, money laundering. As
24 already recorded, Michael Zemlyansky, guilty or not guilty?
25 Not guilty, excuse me. As to defendant Michael Danilovich,

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1 guilty or not guilty?

2 THE FOREPERSON: Blank.

3 THE DEPUTY CLERK: Ladies and Gentlemen, please listen
4 to your verdict as it now stands recorded.

5 As in the matter of United States of America versus
6 Michael Zemlyansky, Michael Danilovich, Tatyana Gabinskaya and
7 Joseph Vitoulis:

8 Count One, racketeering conspiracy. Michael
9 Zemlyansky, blank; Michael Danilovich, blank.

10 Count Two, health care fraud conspiracy. As to
11 Michael Zemlyansky, not guilty; Michael Danilovich, blank;
12 Tatyana Gabinskaya, blank; Joseph Vitoulis, not guilty.

13 Count Three, health care fraud. As to defendant
14 Michael Zemlyansky, not guilty; Michael Danilovich, blank;
15 Tatyana Gabinskaya, blank; Joseph Vitoulis, not guilty.

16 Count Four, mail fraud conspiracy. As to defendant
17 Michael Zemlyansky, not guilty; Michael Danilovich, blank;
18 Tatyana Gabinskaya, blank; Joseph Vitoulis, not guilty.

19 Count Five, mail fraud. As to defendant Michael
20 Zemlyansky, not guilty; Michael Danilovich, blank; Tatyana
21 Gabinskaya, blank; Joseph Vitoulis, not guilty.

22 Count Six, money laundering conspiracy. As already
23 reported, Michael Zemlyansky, not guilty; Michael Danilovich,
24 blank.

25 Count Seven, money laundering. As already reported,

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1 Michael Zemlyansky, not guilty; Michael Danilovich, blank.

2 Count Eight, money laundering. As already reported,
3 Mikhail Zemlyansky, not guilty; Michael Danilovich, blank.

4 Count Nine, money laundering. As already reported
5 Michael Zemlyansky, not guilty; as to Michael Danilovich,
6 blank.

7 THE COURT: The clerk will poll the jury, please.

8 (Jury polled; all answered in the affirmative)s

9 THE DEPUTY CLERK: Your Honor, the jury has been
10 polled and that verdict is unanimous as is it stands.

11 THE COURT: Okay. The verdict will be recorded. This
12 is, again, a partial verdict to supplement the prior partial
13 verdict. As to those counts the verdict will be recorded as
14 has been stated and as the jury has unanimously found. As to
15 the remaining counts which were declared blank, the Court
16 declares the jury deadlocked and there will be mistrial as to
17 those counts.

18 Ladies and Gentlemen, I am going to finally say
19 good-bye to you for the last time with appreciation for your
20 service over the course of this trial. Let me just say this
21 has been a fairly long trial. Sometimes we say that the jury
22 service is the greatest duty of citizens other than military
23 service, and it is, and in some ways the last two months you
24 may compare it to military service because you have put in a
25 lot of time and it has been -- it has been a long trial and it

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1 has been tough deliberations, I know. But, this is how the
2 system works and it is essential to have people like you,
3 essentially a random group of citizens who are willing to come
4 in, sit through the evidence, think about it, talk about it,
5 argue about it and come to unanimous verdict to the extent
6 possible and you have done that. You have spent a lot of time.
7 I feel like it was months ago when we all started and in fact
8 it was almost two months ago. So, I want to thank you all for
9 your service during the course of this trial.

10 I'm now going to release you. You are free to go.
11 Because this trial is over I don't have to tell you anymore not
12 to talk about the case. You are able to talk about the case
13 but I want to provide one caveat to that which is this: If and
14 when you do talk about the case, for example with the lawyers
15 and you are now welcome to talk about your view of the
16 evidence, your view of what worked and what didn't work, what
17 you liked, what you didn't like about the lawyers'
18 presentation, the one caveat is the deliberations themselves I
19 ask you not to discuss the content of the deliberations and
20 that's because none of you has to talk about the case and some
21 of you may not want to. And deliberations happen in secret for
22 a reason: So that jurors are free to express their views and
23 talk and argue about what they think of the evidence. In order
24 to respect your fellow jurors who might not want to reveal
25 their views I would ask you not to talk about what other people

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1 thought and what other people said in the jury deliberation
2 room. But, you are free now to talk to the lawyers or anyone
3 else about the case, subject to my request that you not talk
4 about the substance of your fellow jurors' deliberations in the
5 jury room. And in that regard it is common for lawyers to ask
6 to speak to jurors after a trial. I'm going to release you in
7 a minute and those of you who want to leave are free to leave.
8 There are a couple of administrative things Mr. Skolnik will
9 take care of with you to make sure that your notes are torn up
10 and all of that because we don't keep them for any reason and I
11 am happy to come back and talk to you briefly.

12 I would like to thank you for your service. If you
13 are able to stick around for five minutes I'm happy to shake
14 your hand and thank you for your service and then Mr. Skolnik
15 will do any administrative matters. I'm not going to talk to
16 you about the substance of your deliberations or about the
17 case. If you have questions about the process or any ideas
18 about how we can make jury service more convenient or better I
19 am happy to hear those sorts of things and just thank you for
20 your service. After that, I have told the lawyers who might be
21 interested in talking to you about the case, about whatever
22 happened with the case. If you don't want to talk to them you
23 are free to go. You can walk out the door you have always been
24 leaving and you are free to do that as soon as I let you go and
25 we've followed up on the administrative matters. But, for

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1 those of you who would be happy to speak to any of the lawyers
2 about the trial, you are also welcome to do that and if you
3 stick around after I speak with you and Mr. Skolnik does, for
4 those of you who are happy to stay and talk to them, we will
5 let the lawyers come back to one of the rooms in the back and
6 speak to you about that.

7 So, let me just make sure I have covered everything.
8 Am I forgetting anything?

9 MR. KIM: Not from the government, your Honor.

10 MR. FISCHETTI: Not from us, Judge.

11 THE COURT: Once again, I want to thank you sincerely.
12 This has been a particularly long trial and I want to thank you
13 for all the time you have put in and the work you have done.
14 Thanks very much. Mr. Skolnik will see you to the back.

15 (Jury dismissed)

16 MR. GERMAN: Judge, I would just ask that
17 Dr. Vitoulis' bail be exonerated at this time.

18 MR. KIM: No objection, Judge.

19 THE COURT: That application is granted. I want to
20 thank you all. I have been impressed with your
21 professionalism. It has been an interesting trial and I have
22 seen some really good lawyering and I appreciate all your
23 professional conduct and all your good work.

24 MR. FISCHETTI: May we thank your Honor for the
25 courtesies extended to us and your Honor's staff?

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1 THE COURT: Thank you.

2 MR. GERMAN: Thank you, your Honor.

3 THE COURT: Thanks. We will let you know when they
4 are ready.

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